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DePaul Business and Commercial Law Journal

Volume 8
Issue 2 *Winter 2010*

Article 5

FTC v. Whole Foods Market: A New FTC Preliminary Injunction Standard?

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FTC v WHOLE FOODS MARKET: A NEW FTC PRELIMINARY INJUNCTION STANDARD?

*Jessica Fricke**

The splintered panel opinions will create enormous uncertainty, debate, and litigation over the meaning and effect of this decision. And to the extent common principles and holdings are derived from the opinions of Judge Brown and Judge Tatel, those principles will authorize the FTC to obtain preliminary injunctions and block mergers based on a watered-down preliminary injunction standard and without sufficient regard for the economic principles that have undergirded modern antitrust law.[1]

I. INTRODUCTION

One of the classic dichotomies of antitrust law is the analysis of firm behavior through the balancing of efficiencies against potential harm to consumers. In the instance of mergers, this balance can be a theoretically difficult one. Unlike aspects of antitrust law that are deemed inherently unlawful and anticompetitive, mergers almost always produce a more efficient end product. In today's global economy, it seems as though firms are forced to become large and efficient in order to stay competitive with their rivals. This is often the cry of merging firms looking to overcome a governmental antitrust challenge. The question of focus for antitrust analysis in the merger context, both by judges and governmental enforcement agencies, is whether this end product is one that has the potential to use its size and power to harm consumer welfare.

What makes merger law even more complex is that this question is one that does not have the luxury of hindsight. Mergers are unique in that neither party has the benefit of concrete evidence; the cases are essentially based on prospective material. How will the new market concentration effect consumers? What product will the new market concentration consist of? Will the quantity sold of the product de-

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1. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1063 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

crease? Will the prices of the goods at issue increase? Merger cases do not have the benefit of observing these consequences in the marketplace.

Moreover, the costs of a false negative by a court can be devastating. Once a merger is complete, the cost of unraveling the new firm may be billions, and it may be difficult to fully restore competition in the new market. Can it then be said that the consumer is effectively harmed through this "remedial" measure? In another view, are attorney fees simply too costly for a firm to legitimately compete against a Federal Trade Commission ("FTC") or Department of Justice ("DOJ") challenge? Does this cost deter parent corporations from litigating viable defenses and ultimately merging into a more efficient firm altogether?

On the other side, presumptuous intervention by the courts can have a chilling effect on mergers. Due to the "tenuous nature of merger agreements, the granting of a preliminary injunction effectively kills the deal."[2] In fact, "no firm has continued to litigate a merger against the FTC after losing the preliminary injunction motion and its appeal."[3]

Due to the costs associated with erroneous court decisions, both in favor and against the merging corporations, the federal government has placed substantial procedural hurdles in the way of these companies that are looking to merge. Firms may face challenges by one of the two federal administrative agencies vested with antitrust enforcement power, the FTC and the DOJ,[4] both of which have overlapping jurisdiction, however, as this Note will discuss, also have subtle yet important differentiations in legal standards.

The *FTC v Whole Foods*[5] merger case is a modern example of the abovementioned difficulties that courts are faced with when predicting the effects of a merger. What makes this case even more unique is

2. Thomas A. Lambert, *Four Lessons from the Whole Foods Case: The Antitrust Analysis of Mergers Should be Reconsidered* 29 (Univ. of Mo. Sch. of Law Legal Studies Research Paper Series, Research Paper No. 2008-22), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121789#.

3. Robert C. Jones & Aimee E. DeFilippo, *FTC Hospital Merger Challenges: Is a "Fast-Track" Administrative Trial the Answer To the FTC's Federal Court Woes?*, THE ANTITRUST SOURCE, December 2008, at 4-5, http://www.abanet.org/antitrust/at-source/08/12/Dec08-Jones12-22F.pdf.

4. Antitrust Modernization Commission, Report and Recommendations, at 129 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf. "[I]n addition to the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), fifty states and the District of Columbia are authorized to enforce federal antitrust laws as *parens patriae*, including in instances where the federal enforcers might have chosen not to challenge a transaction or conduct." *Id.* at 127.

5. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008).

the fact that the merger between the two companies had already consummated prior to an appellate court ruling that the merger may be illegal.[6] Thereby, the *Whole Foods* case is also illustrative of the economic costs of an erroneous court decision.

This Case Note will argue that the U.S. Circuit Court for the District of Columbia ("D.C. Circuit") was wrong to overturn the district court's analysis in *Whole Foods*. The D.C. Circuit announced a more lenient standard of review for the FTC's request for a preliminary injunction.[7] This new standard is not only doctrinally incorrect, in that it does not adhere to Supreme Court precedent, but it may also have adverse consequences in the marketplace. Similarly, the fact that the FTC standard of review differs from that of the DOJ makes *Whole Foods* a perfect illustration of the flaws in our dual enforcement system. Finally, the D.C. Circuit also erred in not taking into consideration the fact that the merger had already been consummated.

II. BACKGROUND

A. *Governmental Authority to Prevent Mergers*

Section 7 of the Clayton Antitrust Act ("Clayton Act") prohibits the merging of two corporations "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[8] Both the FTC and the Antitrust Division of the DOJ are vested with the power to enforce this statute.[9] The DOJ enforces Section 7 of the Clayton Act through civil actions, whereas the FTC enforces the antitrust laws through Section 5 of the Federal Trade Commission Act ("FTC Act").[10]

Prior to the notice requirements enacted in 1976, these agencies were forced to attack mergers that had already begun, which proved to be a difficult task.[11] In response to these difficulties, the Hart-

6. *See id.* at 1034.

7. *See id.* at 1041.

8. 15 U.S.C. § 18 (2006).

9. *See* Antitrust Modernization Commission, *supra* note 4, at 129.

10. *Id.*

11. *See* H.R. REP. NO. 94-1373, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2640. "[E]xperience has shown that after consummation occurs, many large mergers become almost unchallengable. The government may well file suit, and ultimately win the subsequent litigation on the merits of its Clayton Act case, by gaining a final judicial declaration of the merger's illegality. Yet by the time it wins the victory - and the government is successful in the vast majority of its litigated merger cases - it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief. During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted,

Scott-Rodino Act was enacted by Congress to prevent the inefficiencies of post-consummation review, thereby attempting to decrease the cost of antitrust enforcement for the courts, parties, and consumers in general.[12] The Hart-Scott-Rodino Act requires that certain proposed mergers be reported to the FTC and the DOJ for approval of consummation.[13] This filing requirement is necessary only for transactions that meet a specific monetary threshold.[14] The threshold is measured by the sales and assets involved in the transaction and the size of the parties.[15] Once the parties file with the correct agency, they must wait thirty days before completing the merger.[16]

During this thirty-day window of review, the federal agency involved (either the FTC or the DOJ) has the authority to ask for a "second request."[17] The parties involved must then submit additional, often more detailed, information and documents.[18] This "second request" thereby extends the waiting period for an additional thirty days after the requested documents have been submitted.[19]

B. *Preliminary Injunctions*

Finally, after reviewing all of the available information, if the reviewing agency believes that the merger will violate antitrust laws, it then has the statutory ability to file a request for injunctive relief in the proper district court.[20] However, the procedural posture of the administrative course of action is dependent on which agency is dealing with the anticipated merger. If the FTC is handling the matter, it must file an administrative complaint after a district court has granted its motion for a temporary restraining order.[21] Through this complaint, the FTC is initiating its own agency proceeding, which will ulti-

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restrained, or simply discharged. In these ways, the acquiring and acquired firms are, in effect, irreversibly 'scrambled' together. The independent identity of the acquired firm disappears. 'Unscrambling' the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible." *Id.* at 2640-41.

12. *See* 15 U.S.C. §18(a).

13. *Id.*

14. *See* Federal Trade Commission, *Federal Trade Commission Revised Jurisdictional Thresholds for Section 7A of the Clayton Act*, http://www.ftc.gov/os/2008/01/P859910sec7a.pdf (last visited March 31,2010).

15. FTC Premerger Notification Office, *Introductory Guide I: What is the Premerger Notification Program?*, revised March 2009, at 2-3, *available at* http://www.ftc.gov/bc/hsr/introguides/guide1.pdf.

16. 15 U.S.C. ξ 18(b)(1)(B).

17. FTC Premerger Notification Office, *supra* note 15, at 12.

18. *Id.*

19. *Id.* at 13.

20. *Id.* at 13-14.

21. *Id.* at 14.

mately determine the legality of the merger.[22] In opposite, if the DOJ is handling the matter, the case never leaves the district court; the legality of the transaction is litigated and determined entirely by the judiciary.[23]

The FTC has the authority to seek preliminary injunctions to stay a potential merger under the authority of Section 13(b) of the FTC Act.[24] According to this statute, the court may only grant the temporary restraining order "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, ..."[25] The role of the district court is unique in this instance; it does not have the authority "to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance."[26] Instead, the district court must determine whether the FTC's accusations are viable enough to stay the often time sensitive merger, a transaction where millions of dollars may be at stake.[27]

The congressional intent behind this legislation is to designate the courts as an objective third party to act as a check on the authority of the FTC.[28] Accordingly, due to the administrative uniqueness of antitrust law and the powers that enforce it, the courts have determined that the FTC has a lighter burden than that required by private litigants under the traditional equity standard.[29] As the D.C. Circuit has expressed, "the FTC does not have to prove . . . that the proposed merger will in fact violate Section 7 of the Clayton Act because ' . . . Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties.' "[30]

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22. FTC Premerger Notification Office, *supra* note 15, at 14.

23. *Id.*

24. 15 U.S.C. § 53(b) (2006).

25. *Id.*

26. FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976).

27. *See id.* The district court must "consider the FTC's likelihood of success and weigh the equities." *Id.*

28. FTC v Nat'l Tea Co., 603 F.2d 694, 698 (8th Cir. 1979).

29. FTC v Libbey, Inc., 211 F. Supp. 2d 34, 44 (D.C. Cir. 2002). "This standard is broader than the traditional equity standard that is normally applicable to requests for injunctive relief and is consistent with Congress' intention 'that injunctive relief be broadly available to the FTC.'" *Id.* (quoting FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1080-81 (D.C. Cir. 1981))

30. *Id.* (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001)).

C. *Whole Foods Procedural Posture*

At the beginning of 2007, Whole Foods announced it was looking to enter into an agreement to purchase Wild Oats.[31] At the time, Whole Foods and Wild Oats were the first and second "largest supermarket chain[s] focusing on natural and organic products in the United States,"[32] with Whole Foods operating 194 grocery stores and Wild Oats operating 110.[33] Accordingly, the two food market stores followed the Hart-Scott-Rodino Act protocol for their $565 million merger.[34] This entire pre-merger notification process lasted approximately four months.[35]

On June 6, 2007, the FTC filed a Complaint for Temporary Restraining Order and Preliminary Injunction in the U.S. District Court for the District of Columbia ("D.C. District Court") alleging a potential violation of Section 7 of the Clayton Act by Whole Foods.[36] In its complaint, the FTC alleged that the merger of Whole Foods and Wild Oats would substantially lessen competition in the operation of what it labeled the product market of "premium natural and organic supermarkets" ("PNOS") in twenty-one geographic markets.[37] Thereby, the FTC argued that the merger would likely lead to higher prices, reduced quality, and fewer choices for consumers.[38]

In August 2007, the D.C. District Court denied the FTC's request to block the merger.[39] The court concluded "[t]here [was] no substantial likelihood that the FTC [could] prove its asserted product market and thus no likelihood that it [could] prove that the proposed merger may substantially lessen competition or tend to create a monopoly."[40] In coming to this determination, the district court, after a fact intensive analysis, concluded that Whole Foods competed against all supermarkets and not just organic stores.[41] The district court therefore rejected the FTC's PNOS analysis and labeled the relevant market as all super-

31. Michael B. Bernstein & Deborah L. Feinstein, *All Over the Map: Grocery Store Enforcement from Von's to Whole Foods*, 22 ANTITRUST 52, 55 (2007).

32. *Id.*

33. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1032 (D.C. Cir. 2008).

34. *Id.*

35. *See id.*

36. *Id.*

37. FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 5 (D.D.C. 2007), *rev'd* 548 F.3d 1028 (D.C. Cir. 2008).

38. *See id.*

39. *Id.* at 4.

40. *Id.* at 49-50.

41. *Id.* at 36.

markets for the purpose of evaluating this merger.[42] In the end, the court concluded that the merger of Whole Foods and Wild Oats would not substantially lessen competition in a market that included all supermarkets.[43] Ultimately, the district court stopped its analysis at the product market definition determination, and "[b]elieving such a basic failure doomed any chance of the FTC's success, the court denied the preliminary injunction without considering the balance of the equities."[44]

After the decision, the FTC filed an emergency motion for an injunction pending appeal.[45] This motion was denied by the D.C. Circuit.[46] Subsequently, believing they were adhering to court approval, on August 28, 2007, Whole Foods and Wild Oats consummated their merger.[47] While effectuating the merger, parent company Whole Foods spent an enormous amount of resources in its effort to almost fully integrate the two brands.[48] Whole Foods sold all of the stores that had traded under the names "Sun Harvest" and "Henry's" and spent millions of dollars and over 200,000 hours training Wild Oats's personnel.[49]

However, in the interim, the FTC filed for appeal.[50] Sending shock through the antitrust community, the D.C. Circuit reversed the district court's conclusions that the FTC showed no likelihood of success in an eventual claim under Section 7 of the Clayton Act.[51] This opinion will be the topic of discussion throughout this note.

D. *Status of Whole Foods Today*

On March 6, 2009, the FTC announced a "settlement with Whole Foods Market, Inc., that will substantially restore competition that was eliminated by Whole Foods' 2007 acquisition of its closest rival, Wild Oats Markets, Inc., and resolves agency charges that the acquisi-

42. *See* FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 36 (D.D.C. 2007), *rev'd* 548 F.3d 1028 (D.C. Cir. 2008).

43. *See id.* at 49-50.

44. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1033 (D.C. Cir. 2008).

45. *Id.*

46. *See* Per Curiam Order, FTC v. Whole Foods Mkt., Inc., No. 07-5276 (D.C. Cir. Aug. 23, 2007).

47. Complaint for Declaratory and Injunctive Relief at 7, Whole Foods Mkt., Inc. v. FTC, 1:08 CV 02121 (D.D.C. Dec. 8, 2008).

48. *Id.*

49. *Id.*

50. *See* FTC. v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008).

51. *See id.*

tion violated federal antitrust laws."[52] In exchange for the FTC dropping its antitrust suit, Whole Foods agreed to sell thirty-two Wild Oats stores.[53] Of these thirty-two stores, only twelve were in operation at the time of the settlement.[54] Also, Whole Foods was required to relinquish the rights to the Wild Oats brand through the sale of the Wild Oats trademarks and other intellectual property.[55] A divestiture trustee is to be responsible for this sale, which is to be completed within six months from the date of settlement.[56] If the stores are not sold within six months from the date of settlement, the FTC may extend the time limit to do so for another six months.[57]

III. SUBJECT OPINION

On July 19, 2008, the D.C. Court of Appeals, in what has become a controversial opinion, reversed the district court's conclusions that the FTC showed no likelihood of success in an eventual Section 7 claim under the Clayton Act, and remanded the case for further proceedings.[58] What makes this D.C. Court of Appeals decision unique is that, although there was a majority decision to reverse the district court's decision, there were three separate and distinct opinions regarding the correct analysis of the market definition and the standard the FTC must meet for a preliminary injunction.[59] The D.C. Court of Appeals issued an amended opinion on November 21, 2008, which included Judge Tatel's opinion, concurring in the judgment, stating that he agreed with Judge Brown's majority decision but disagreed with his analysis.[60] Although this amended concurrence is splintered, as Judge Kavanaugh warned in his dissenting opinion, it will most likely constitute binding precedent.[61]

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52. Federal Trade Commission, FTC Consent Order Settles Charges that Whole Foods' Acquisition of Rival Wild Oats was Anticompetitive, http://www.ftc.gov/opa/2009/03/whole-foods.shtm (last visited Mar. 20, 2010).

53. *Id.*

54. Whole Foods Market, Financial Press Releases, http://www.wholefoodsmarket.com/company/press-releases.php (follow "Whole Foods Market and FTC Reach Settlement" hyperlink) (last visited Mar. 20, 2010).

55. *Id.*

56. FTC Consent Order, *supra* note 52.

57. *Id.*

58. *See* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008).

59. *See id.*

60. *Id.* at 1041-42 (Tatel, J., concurring).

61. *Id.* at 1061, n.8 (Kavanaugh, J., dissenting). "Like the Supreme Court, this [D.C. Circuit] Court has routinely recognized that a decision without a majority opinion usually still constitutes a binding precedent." *Id.*

A. *Consensus between Judge Brown's and Judge Tatel's Opinions*

Both Judge Brown and Judge Tatel used the same preliminary injunction standard by agreeing that "the FTC [would] usually be able to obtain a preliminary injunction blocking a merger by 'rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.'"[62] They also agreed that once the FTC meets this standard, there becomes "'. . . a presumption in favor of preliminary injunctive relief,'[63] but the merging parties may rebut that presumption, requiring the FTC to demonstrate a greater likelihood of success, by showing equities weighing in favor of the merger."[64]

Perhaps most notably, the two judges agreed that the appellate court still had jurisdiction over the matter, even though the parties had consummated the merger.[65] Judge Brown strongly expressed this: "[o]nly in a rare case would we agree a transaction is truly irreversible, for the courts are 'clothed with large discretion' to create remedies 'effective to redress [antitrust] violations and to restore competition.'"[66] Judge Brown noted that the court still had the power to preserve the status quo through an injunction because there were still viable remedies and an opportunity to "mitigat[e] the merger's alleged harm to competition."[67] As applied to this case, Brown expressed that an injunction could halt the complete integration of the two firms even though Whole Foods had already sold some of Wild Oats's assets to third parties.[68] Similarly, Judge Brown made the point that if one Wild Oats store could reopen and remain independent of Whole Foods, then the FTC had the ability to remedy a Section 7 violation under the Clayton Act, and for this reason, the case was not moot.[69]

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62. *Id.* at 1035 (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714–15 (D.C. Cir. 2001)) (majority opinion).

63. Whole Foods, 548 F.3d at 1035 (quoting Heinz, 246 F.3d at 726).

64. *Id.* (quoting FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1087 (D.C. Cir. 1981)).

65. *Id.* at 1033-1034. *See also id.* at 1050.

66. *Id.* at 1033 (quoting Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972)).

67. *Id.* at 1034.

68. Whole Foods, 548 F.3d at 1034.

69. *Id.* "Moreover, the FTC is concerned about eighteen different local markets. If, as appears to be the situation, it remains possible to reopen or preserve a Wild Oats store in just one of those markets, such a result would at least give the FTC a chance to prevent a § 7 violation in that market." *Id.*

B. *Judge Brown's Majority Opinion*

Brown and Tatel's opinions then diverged at how the district court erred in applying the standard for an injunction.[70] According to Judge Brown's opinion, "[d]espite some ambiguity, the district court applied the correct legal standard to the FTC's request for a preliminary injunction."[71] He reiterated that, "[i]n any case, a district court must not require the FTC to prove the merits, because, in a [Section 13(b) of the FTC Act] preliminary injunction proceeding, a court 'is not authorized to determine whether the antitrust laws . . . are about to be violated.'"[72] Brown, however, found error in the district court's failure to apply a sliding scale test.[73] He emphasized that in order for the district court to correctly apply the equity test and at the same time remain consistent with the Section 13(b) standard under the FTC Act, "this decision [not to apply the sliding scale test] must have rested on a conviction the FTC entirely failed to show a likelihood of success."[74]

Brown then stated that although the district court "acted reasonably in focusing on the market definition,"[75] it erred in its overall conclusion by analyzing the product market incorrectly.[76] Specifically, the district court had considered only "marginal consumers," those who would switch from Whole Foods or Wild Oats to lower priced supermarkets once prices hit supracompetitive levels.[77] However, Judge Brown agreed with the FTC that, "in the high-quality perishables on which both Whole Foods and Wild Oats made most of their money, they competed directly with each other, and they competed with supermarkets only on the dry grocery items that were the fringes of their business."[78] With this determination, Brown concluded that these types of stores cater to what the FTC calls a PNOS submarket, which consists of a group of consumers who "have decided that natural and organic is important, lifestyle of health and ecological sustainability is important."[79]

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70. *See id.* at 1042 (Tatel, J., concurring).

71. *Id.* at 1034 (majority opinion).

72. *Id.* at 1035 (quoting FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976)).

73. Whole Foods, 548 F.3d at 1035. *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 727 (D.C. Cir. 2001).

74. *Id.*

75. *Id.* at 1036.

76. *Id.*

77. *Id.* at 1037.

78. Whole Foods, 548 F.3d at 1040.

79. *Id.* at 1039 (quoting FTC v Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 23 (D.D.C. 2007)).

Brown also determined that "evidence of consumer behavior supported the conclusion that PNOS serve a core consumer base,"[80] and, therefore, the district court's determination "was an error of law, because in some situations core consumers, demanding exclusively a particular product or package of products, distinguish a submarket."[81] To Brown, this may be sufficient evidence to obtain a preliminary injunction under his sliding scale analysis.[82] He left the determination of equities to the district court on remand.[83]

Judge Brown reached his ultimate conclusion that the FTC met its preliminary injunction standard by emphasizing that the district court ignored significant evidence.[84] He stressed the FTC's evidence that price margins for Whole Foods stores were depressed in cities that also contained a Wild Oats store.[85] He also pointed out the existence of defendant's internal documents projecting that if a Wild Oats near a Whole Foods closed then a majority of its customers would switch to Whole Foods.[86] Finally, the judge emphasized the market research presented at trial, which "indicated [that] 68% of Whole Foods customers are core customers who share the Whole Foods 'core values.'"[87]

C. *Judge Tatel's Concurring Opinion*

Judge Tatel clarified in his opinion, using the same preliminary injunction standard as Brown, that in the D.C. Circuit, "the standard for likelihood of success on the merits is met if the FTC 'has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, ...'"[88] However, Tatel then diverged from Brown in the application of this standard by focusing on the FTC's evidence and agreeing with the Commission "that Whole Foods and Wild Oats are not 'reasonabl[y] interchangeab[le]' with conventional supermarkets and do not compete directly with them."[89] Tatel also heavily relied on the incriminating emails sent by Whole Foods' CEO, John Mackey, suggesting that

80. *Id.* at 1040.
81. *Id.* at 1041.
82. *Id.*
83. Whole Foods, 548 F.3d at 1041.
84. *See id.*
85. *Id.* at 1040.
86. *Id.* at 1038.
87. *Id.* at 1040.
88. Whole Foods, 548 F.3d at 1042 (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001) (Tatel, J., concurring).
89. *Id.* at 1043.

the sole reason for the merger was to squash its competitor.[90] Judge Tatel acknowledged that intent was not an element in assessing whether a merger violates antitrust laws, but he noted that "evidence indicating the purpose of the merging parties, where available, *is an aid* in predicting the probable future conduct of the parties and thus the probable effects of the merger."[91]

D. *Judge Kavanaugh's Dissenting Opinion*

Judge Kavanaugh was the only judge of the three to agree with the district court's ruling.[92] In a strong dissent, Kavanaugh noted the contradictory nature that had been taken on by the D.C. Court of Appeals:

> Both a year ago and now, the same central question has been before the Court in determining whether to approve an injunction: whether the FTC demonstrated the necessary "likelihood of success" on its § 7 case. A year ago, the Court said no. Now, the Court says yes. The now-merged entity, the industry, and consumers no doubt will be confused by this apparent judicial about-face.[93]

Kavanaugh then reiterated the district court's conclusion that Whole Foods is a competitor with all supermarkets, not just those that are in the organic-only submarket.[94]

Judge Kavanaugh most harshly criticized the majority's low preliminary injunction standard, as applied to the FTC.[95] Kavanaugh stressed that, "[e]ven at the preliminary injunction stage, the relevant statutory text and precedents expressly require that the FTC show a 'likelihood of success on the merits.'"[96] In Kavanaugh's words, the correct preliminary injunction standard requires more of a showing than Brown and Tatel's standard and is met "by establishing a likelihood of success - namely, a likelihood that, among other things, the merged entity would possess market power and could profitably impose a significant and nontransitory price increase."[97] Kavanaugh provided a structural requirement to this standard by quoting Section 1.11 of the Horizontal Merger Guidelines[98] and noting that the FTC

90. *Id.* at 1049. Mackey stated in an email that Wild Oats was "the *only existing company* that ha[d] the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means *eliminating this threat forever, or almost forever.*" *Id.*

91. *Id.* at 1047.

92. *See id.* at 1051 (Kavanaugh, J., dissenting).

93. Whole Foods, 548 F.3d at 1051-52.

94. *See id.* at 1052.

95. *Id.*

96. *Id.* (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001)).

97. *Id.* at 1061.

98. Horizontal Merger Guidelines § 1.11 (1997).

"needs to make a sufficient showing that the merged company could exercise market power and profitably impose a 'small but significant and nontransitory increase in price.'"[99]

Kavanaugh also expressed that Brown and Tatel's new preliminary injunction standard did not adhere to the Supreme Court's announcement of this standard in *Munaf v Geren*.[100] According to Kavanaugh, in *Munaf*, "the Supreme Court unanimously rejected [the] lesser 'serious questions' standard as too weak and not equivalent to the 'likelihood of success' necessary for a preliminary injunction to issue."[101] Kavanaugh then noted that both Brown and Tatel approved "the FTC's request for preliminary injunction without making the essential 'likelihood of success' finding that is required by the statutory text and Supreme Court precedent."[102]

Kavanaugh gave off the overall sense in his dissent that the majority had delegated too much power and deference to the FTC by "watering down the preliminary injunction standard."[103] He feared that Brown's reading of the law would allow "the FTC to just snap its fingers and temporarily block a merger."[104] Prior to Tatel's amended concurrence, Kavanaugh believed that in diluting the FTC's requirements for a preliminary injunction, Judge Brown was "hint[ing] that the FTC need not demonstrate a likelihood of success to obtain a preliminary injunction in a [Section 7 Clayton Act] case."[105] He feared Brown's lax standard "would . . . enhance the FTC's power to torpedo mergers well beyond what Congress has authorized."[106]

IV. ANALYSIS

The D.C. Circuit in *Whole Foods*[107] was incorrect to reverse the district court's decision to deny the FTC's request for a preliminary injunction in four separate respects. First, the D.C. Circuit was flawed in its analysis when coming to its determination of a standard of review for the preliminary injunction by failing to adhere to Supreme Court precedent.[108] Second, the appellate court's standard that the

99. Whole Foods, 548 F.3d at 1052.

100. *See id.* at 1061.

101. *Id.* at 1061 (citing Munaf v. Geren, 128 S.Ct. 2207, 2219 (2008)).

102. *Id.*

103. *Id.*

104. Whole Foods, 548 F.3d at 1052.

105. FTC v Whole Foods Mkt., Inc., 533 F.3d 869, 893, n.3 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *op. amended and superseded*, 548 F.3d 1028 (D.C. Cir. Nov. 21, 2008).

106. *Id.*

107. FTC v. Whole Foods Mkt, Inc. 548 F.3d 1028 (D.C. Cir. 2008) (majority opinion).

108. *See infra* Section IV. A.

FTC must meet to show that it is entitled to a preliminary injunction is much too lax, which may cause ramifications for future antitrust cases and firm behavior in the decision-making process of potentially merging firms.[109] Third, the D.C. Circuit's analysis and procedural flaws illustrate the problems of the United States' dual antitrust system as a whole.[110] Finally, the fact that the merger between Whole Foods and Wild Oats had been consummated should have been taken into consideration when the court of appeals reviewed the FTC's claim.[111]

A. *Standard for Preliminary Injunction Does Not Follow Precedent*

The standard used by the appellate majority in determining when the FTC can secure a preliminary injunction to block a merger does not follow its own precedent. In effect, the standard enunciated by the court of appeals is too lax and may hinder economic growth and viability.

Although the panel does make its own determination of relevant market power, the opinion seems to suggest that proof of a relevant market may not even be necessary.[112] Notably, the D.C. Circuit expressed that it is not necessary for the FTC "to settle on a market definition at this preliminary stage" because preliminary injunctions sought by the agency "are meant to be readily available to preserve the status quo while the FTC develops its ultimate case, ..."[113] However, preserving the status quo in merger cases may effectively mean ultimately holding in favor of the governmental agency.[114]

In the majority opinion, Judge Brown enunciates the correct structure for a Section 7 violation under the Clayton Act: "the framework we have developed for a *prima facie* [Section 7] case rests on defining a market and showing undue concentration in that market, ..."[115] However, he goes on to seemingly imply that a showing below this threshold may be enough to stay a merger via a preliminary injunction.[116] He backtracks from the correct reading of the Section 7 requirement when he says that "this analytical structure does not exhaust the possible ways to prove a [Section 7] violation on the merits, . . . much less the ways to demonstrate a likelihood of success on

109. *See id.*
110. *See infra* Section IV. B.
111. *See infra* Section IV. C.
112. *See* Whole Foods, 548 F.3d at 1036.
113. *Id.*
114. *See* Jones, *supra* note 3.
115. Whole Foods, 548 F.3d at 1036 (quoting United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990)).
116. *See id.*

the merits on a preliminary proceeding."[117] Judge Brown's standard thereby does away with the requirement that the FTC show a "likelihood of success on the merits," as required by *FTC v. H.J. Heinz Co.*[118]

1. Standard Does Not Follow *Heinz/Baker* Framework

This lax standard for a preliminary injunction, enunciated by Brown and Tatel, incorrectly dilutes the standard used by the D.C. Circuit in *Heinz*.[119] In *Heinz,* the FTC sought a preliminary injunction pursuant to Section 13(b) of the FTC Act to enjoin the consummation of a merger between two baby food producers.[120] The *Heinz* court, when determining the FTC's probability of success, used the *Baker Hughes* analysis: "[f]irst the government must show that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of the firms in that market.'"[121] Not only did the *Heinz* court apply the *Baker Hughes* analysis, but the court applied it in detail throughout a majority of its opinion, thereby emphasizing its importance.[122]

The appellate panel seemed to write off this analysis by its suggested abandonment of the "likelihood of success" test.[123] Judge Kavanaugh stresseed in his dissent that Brown and Tatel incorrectly apply *Heinz* because "*Heinz* only *assumed* [the] particular gloss on the 'likelihood of success on the merits' requirement for preliminary injunctions based on a concession in the case."[124] Also, Kavanaugh noted that Section 13(b) of the FTC Act "unambiguously requires that courts consider 'the Commission's likelihood of ultimate success' . . . ."[125]

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117. *Id.* (citing United States v. El Paso Natural Gas Co., 376 U.S. 651, 660 (1964)).

118. *Id.* at 1059 (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001)) (Kavanaugh, J., dissenting).

119. *Id.*

120. Heinz, 246 F.3d at 711. In *Heinz*, the FTC brought suit seeking to prevent the merger of the second and third largest manufacturers of jarred baby food. *Id.*

121. *Id.* at 715 (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963)). "Although *Baker Hughes* was decided at the merits stage as opposed to the preliminary injunctive relief stage, we can nonetheless use its analytical approach in evaluating the Commission's showing of likelihood of success." *Id.*

122. *See id.* at 715-24.

123. *See* FTC v Whole Foods Mkt., Inc., 533 F.3d 869, 893, n.3 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *op. amended and superseded*, 548 F.3d 1028 (D.C. Cir. Nov. 21, 2008).

124. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1059-60 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

125. *Id.* at 1060. For a discussion on how *Whole Foods* diverges from the congressional intent of the FTC Act, *see* Ilene K. Gotts, Joseph J. Simons, George T. Conway III & Aidan Synnott,

2. Standard for Preliminary Injunction Is Too Lax

Not only does this newly announced preliminary injunction standard contradict precedent and statutory language, it also gives the FTC too much deference, which may prove to have drastic effects in the marketplace. As Judge Kavanaugh warned in his dissent, this ignorance of precedent combined with a lax standard for a preliminary injunction may lead to the ability of the FTC to prohibit mergers at its whim.[126] In consequence, this new standard may effectively defeat the purpose of judicial review under Section 13(c) of the FTC Act, seemingly giving the FTC tacit approval without a thorough analysis.[127]

Although it is true that actual proof that a relevant market exists will not be necessary until the case is adjudicated administratively by the agency, in the meantime, the merger must be halted if the preliminary injunction passes judicial review. But this may prove too little too late. This unfettered discretion given to the FTC will have harmful effects on time-sensitive mergers. The primary purpose of preliminary injunctions is to stay harmful effects of potentially illegal behavior in a timely manner.[128] This case is a perfect illustration of how this primary purpose of a preliminary injunction is practically being eliminated. Although the FTC and Whole Foods eventually settled, the review of the injunction itself took over a year and was never finally determined by the courts.[129]

Such a lax standard may have an even more significant effect on the market through the deterrence of efficient mergers. "[G]iven the tenuous nature of merger agreements, the granting of a preliminary injunction effectively kills the deal."[130] Statistics show that no firm has chosen to continue to litigate a merger against the FTC after losing its preliminary injunction motion.[131] Today, investors may even be more sensitive to the news of a motion for a preliminary injunction, causing

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Recent DC Circuit decisions in Whole Foods leave standard for future mergers unsettled, COMPETITION LAW INT'L, 12, 17-18 (Feb. 2009), http://www.paulweiss.com/files/Publication/e11afde3-7de6-479b-b0b8-5a43e25538c9/Presentation/PublicationAttachment/03f09973-5fbf-463a-9cbb-bb01784d506b/PW_CLI_Feb09.pdf.

126. Whole Foods, 548 F.3d at 1052 (Kavanaugh, J., dissenting).

127. *See id.*

128. *See* FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1344 (4th Cir. 1976). "The only purpose of a proceeding under s 13 is to preserve the status quo until FTC can perform its function". *Id.*

129. *Id.* at 1051. On July 29, 2008, the circuit court remanded back to the district court to weight the equities, a question it had not addressed in its original opinion. *Id.* On March 6, 2009 the FTC and Whole Foods announced a settlement agreement, at that time the district court had not yet made its final determination on the equities. *See* Per Curiam Order, *supra* note 46.

130. Lambert, *supra* note 2, at 29.

131. Jones, *supra* note 3.

them to err on the side of risk aversion and deter them from pursuing perfectly legal mergers.

On another note, the preliminary injunction standard is too low because it causes a divergence in the analysis for a final decision versus the analysis for a preliminary injunction. As a practical matter, the higher standard applied to permanent sanctions of mergers may cause different results, although faced with the same set of facts. "For instance, if the FTC brings a preliminary injunction motion under [S]ection 13(b) of the FTC Act, it must effectively meet a public interest test. But if it wants to permanently block a merger, it must prove the substantive elements of [S]ection 7 of the Clayton Act, which it seeks to do in an administrative hearing before the agency."[132]

The emphasis on the weight of the preliminary injunction hearing to the entire livelihood of the merger also presents due process issues when it comes to a lax standard for a preliminary injunction. "The lower legal threshold for a preliminary injunction . . . raises the issue of whether the FTC can provide the parties to an enjoined merger with a practical opportunity to address the merits in the FTC's administrative process."[133] *Whole Foods* is illustrative of this issue.[134] Whole Foods litigated its preliminary injunction for almost two years; however, the case came to a settlement prior to the real adjudication of the case on its merits in an FTC agency administrative proceeding.[135]

B. *Whole Foods Highlights the Flaws in Our Dual-Enforcement System*

The circuit court's decision in *Whole Foods* illustrates the discrepancies between the FTC and the DOJ when it comes to their means of preventing mergers and inhibiting competition. Specifically, the decision highlights the fact that the FTC's standard for review of a preliminary injunction is more relaxed than the standard faced by the DOJ.

1. The Agencies and Their Different Procedural Courses

When faced with issues involving mergers, the DOJ and the FTC differ procedurally. The FTC, as was done in the *Whole Foods* case, uses the court system only to preserve the status quo through tools

132. Dany H. Assaf & Sarah K. McLean, *It's Not Over Until It's Over: When is the Deal Really Done?*, 23 ANTITRUST 59, 60 (2008).

133. Jones, *supra* note 3, at 7.

134. *See* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008) (majority opinion).

135. *See supra* note 130 and accompanying text.

such as judicial preliminary injunctions.[136] Traditionally, the FTC's administrative review of the merger is stayed until the determination of the preliminary injunction by a federal court.[137] By nature, these injunctions are temporary, not permanent (as compared to those injunctions sought by the DOJ).[138] The FTC then adjudicates cases on their merits through an administrative proceeding for a final determination.[139] This method of adjudication can often be cumbersome and time consuming to a firm faced with an FTC challenge.

On a similar note, if the FTC is unable to obtain a preliminary injunction in the federal court, the agency is still able to seek permanent relief in administrative Part III proceedings.[140] Therefore, although the parties have the legal ability to consummate the proposed transaction, "antitrust litigation may continue for the merged parties while the FTC pursues permanent relief via Part III proceedings."[141] This could ultimately burden the merger because "[s]uch administrative litigation can be lengthy, leaving a completed transaction in the limbo of litigation for over a year."[142]

In contrast to the FTC, the DOJ, as a branch of the judiciary, has a different procedural course for the way it handles firms looking to merge. The adjudication process is more streamlined than that of the FTC because the DOJ tries its merger cases in the same federal court in which it has the ability to seek preliminary injunctive relief.[143] Also, the DOJ is more efficient in that it normally "seeks a permanent injunction (along with a preliminary injunction) against mergers it believes are anticompetitive, resolving the question fully and completely in a single proceeding before a judge."[144] "If the DOJ fails to obtain the permanent injunction it seeks, the parties can consummate the merger without further antitrust litigation (assuming the DOJ does

136. *See* 15 U.S.C. ξ 53(b).

137. Jones, *supra* note 3, at 5. "Given the magnitude of the preliminary injunction process and the resources needed to litigate the motion, the FTC's administrative review traditionally has been stayed until resolution of the 13(b) action." *Id.*

138. Antitrust Modernization Commission, *supra* note 4, at 130.

139. *See* FTC Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §§ 3.1-3.72.

140. Antitrust Modernization Commission, *supra* note 4, at 130. The FTC has the ability to enforce Section 5 of the FTC Act through internal administrative litigation before an administrative law judge, subject to review by the FTC Commissioners and a federal court of appeals. These enforcements are referred to as "Part III proceedings." *See id.* at 129.

141. *Id.* at 130.

142. *Id.*

143. *See id.*

144. *Id.* at 130. "Generally, the DOJ agrees with the parties to combine (or consolidate) proceedings for both a preliminary injunction and a permanent injunction in court (despite statutory authorization to seek permanent relief in court as well)." *Id.* at 138.

not appeal)."[145] Not only is the process streamlined, but there seems to be an element of fairness in the fact that the final decision maker is the same authority as the authority making the preliminary injunction determination: the federal judge.

2. Preliminary Injunction Standard

The DOJ and the FTC have different adjudication procedures because of the root of their statutory authority. The FTC's authority to seek a preliminary injunction comes from Section 13(b) of the FTC Act.[146] As discussed at length above, this standard allows an injunction to be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, ..."[147] Conversely, the DOJ is entitled to seek preliminary injunctions under Section 15 of the Clayton Act.[148] The statutory authority for the DOJ does not enumerate a specific preliminary injunction standard, unlike Section 13(b) of the FTC Act does for the FTC.[149] Therefore, courts normally hold the DOJ to the common law standard to which private plaintiffs are held.[150] This standard typically requires a likelihood of success on the merits.[151] Therefore, even prior to the relaxing of a preliminary injunction by the *Whole Foods* case, the DOJ was faced with a lower standard than the FTC. The *Whole Foods* standard simply enlarges this discrepancy.

Also, as mentioned above, the DOJ tends to agree with the private parties to consolidate their actions for preliminary and permanent injunctions.[152] Therefore, as a practical matter, the DOJ more often than not is required to show "that the proposed merger would violate Section 7 of the Clayton Act by a preponderance of the evidence."[153] This preponderance of the evidence standard is in even further contrast with the newly watered down standard announced by the D.C. Circuit in *Whole Foods*.

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145. Antitrust Modernization Commission, *supra* note 4, at 130.

146. *See* 15 U.S.C. § 53(b).

147. *Id.*

148. *See* 15 U.S.C. § 15.

149. Antitrust Modernization Commission, *supra* note 4, at 142.

150. *Id.* "[C]ourts generally apply a version of the traditional equity test, which does not require the usual showing of irreparable injury. Some courts describe the proper test as 'whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor.'" *Id.*

151. *Id.*

152. *Id.* at 139.

153. *Id.*

3. The Discrepancies and Their Effect on the Marketplace

These procedural differences may be detrimental to federal antitrust enforcement. As mentioned before, "this difference could materially affect the parties' prospects for completing their transaction" due to the fact that cases typically hinge on the granting or dismissal of a preliminary injunction.[154] Because preliminary injunctions seem to be very outcome determinative in the cases of time sensitive mergers, this lighter burden held by the DOJ could make the ultimate outcome of a merger challenge dependent upon which agency brings the challenge as opposed to the merits of the case.[155] These discrepancies then may inevitably cause one agency to favor specific litigation over the other, thereby causing artificially high enforcement by one agency.[156]

Not only does this discrepancy seem inherently unjust, but it also places undue procedural burdens on companies that are forced to adhere to different legal obligations. With multiple enforcers, firms contemplating a merger are potentially subjected "to a range of different legal obligations, thus either imposing substantial compliance costs or compelling companies to follow the rules of the most restrictive jurisdiction."[157] Consequently, these additional costs are unavoidably passed down to consumers.[158]

The former Antitrust Modernization Commission[159] ("AMC") has addressed its concern for this discrepancy. The AMC fears that this inconsistency between the two agencies has the potential to "undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly . . . ."[160] Because the FTC has the ability to adjudicate matters via administrative litigation after a preliminary injunction, the AMC feels as though companies may take additional precautions and this "may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if

154. Antitrust Modernization Commission, *supra* note 4, at 139.

155. *Id.* at 130-31.

156. *See id.*

157. *Id.* at 127.

158. *See id.* As the Commission puts it, "[o]f course, antitrust compliance and enforcement will always impose some costs on companies, regardless of the number of enforcers. It is important, however, to ensure that those costs do not overwhelm the benefits of antitrust enforcement or undermine consensus about the value of a strong antitrust enforcement regime." *Id.*

159. The Antitrust Modernization Commission terminated on May 31, 2007, pursuant to the Antitrust Modernization Commission Act, as amended. Antitrust Modernization Commission, http://govinfo.library.unt.edu/amc/index.html (last visited Mar. 28, 2010). The Antitrust Modernization Commission submitted its Report and Recommendations to Congress and President Bush on April 2, 2007. *Id.*

160. Antitrust Modernization Commission, *supra* note 4, at 131.

they had been investigated by the DOJ."[161] However, "[r]egardless of the degree of effect, these factors have led some knowledgeable practitioners to believe that companies whose mergers are investigated by the FTC are at a disadvantage as compared with those investigated by the DOJ."[162] Thereby, the AMC warns that firms may favor a charge brought by the DOJ versus the FTC.[163] The general fear is that the American people could see two different results from two cases with identical facts. This discrepancy in the agencies may thereby cause the public to lose confidence in the enforcement system in general. The AMC codified these concerns in its recommendation to Congress:

> Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.[164]

On a similar note, the AMC also recommended that the FTC adjudicate matters in a similar fashion to the DOJ:

> The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.[165]

Although revision of the specificity of the preliminary injunction standard may only be done through congressional amendment, the *Whole Foods* case is a perfect illustration of the concerns addressed by the AMC.[166] The FTC should have been subjected to a higher standard for a preliminary injunction, similar to that faced by the DOJ.; if the FTC had been subject to this review in the first place, the FTC may have put on a stronger case in front of the district court, potentially reducing the risk of this costly and time-consuming appeal.[167]

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161. *Id.*

162. *Id.*

163. *See id.*

164. *Id.* at 132.

165. Antitrust Modernization Commission, *supra* note 4, at 131.

166. *See* Lambert, *supra* note 2, at 29. "The Whole Foods case demonstrates the wisdom of raising the standard of proof for injunctive relief." *Id.*

167. *Id.*

The appellate court's decision may in fact spawn more aggressive FTC behavior and cause the FTC to take on more merger cases. Along with the AMC's fears that companies will favor a charge by the DOJ, there also remains a concern that the FTC will pursue mergers more aggressively in comparison to the DOJ due to their lower burden of proof.[168] This new standard may also cause premature prosecution; as forecasted by some practitioners, "the decision will likely invigorate the FTC to challenge mergers before it has fully developed its theories of competitive harm."[169] It seems as though these inefficient and unjust consequences are those of which the AMC warned.

C. *Fact That Merger Had Been Consummated Should Have Been Taken Into Consideration*

An important issue distinct from that of the FTC's standard for a preliminary injunction is the reality of the court of appeals' failure to take into consideration the fact that the merger between Whole Foods and Wild Oats had already been consummated. The court remanded the decision back to the district court for the precise determination of a violation and remedial measures.[170] However, the appellate court seemed to brush off the fact that Whole Foods had spent millions of dollars by beginning to effectuate the merger.

While on appeal, Whole Foods and Wild Oats, with what they believed to be express approval of their merger by the judiciary, began to effectuate their merger.[171] During the timeframe between the district court decision and the D.C. Circuit decision, Whole Foods spent an enormous amount of resources in an effort to begin the full integration of the two brands.[172] As mentioned above, Whole Foods sold all of the stores that had traded under the names "Sun Harvest" and "Henry's" and spent millions of dollars and over 200,000 hours training Wild Oats's personnel.[173]

However, Judge Brown only lightly discussed the issue of mootness due to the consummation of the merger.[174] He acknowledged that the

168. *See* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1052 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

169. McDermott, Will & Emery, *D.C. Circuit Reverses Decision Denying Preliminary Injunction in Whole Foods/Wild Oats Merger*, McDermott Newsletters, Aug. 13, 2009, http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/52c97533-794c-4cad-9aa1-1ff78fe90b5e.cfm.

170. Whole Foods, 548 F.3d at 1041 (majority opinion).

171. Complaint for Declaratory and Injunctive Relief, *supra* note 47.

172. *Id.*

173. *Id.*

174. Whole Foods, 548 F. 3d at 1034.

court had "no 'authority to command return to the status quo,' . . . in a literal way by forcing absent parties to sell those assets back to Whole Foods, but there is no reason to think that inability prevents [the court] from mitigating the merger's alleged harm to competition."[175] With this acknowledgment of a lack of a concrete remedy for the assets already sold, Judge Brown failed to specifically describe a plan as to how the situation could be remedied.[176]

Even the FTC, in different merger cases, has stressed the difficulty of "unscrambling" consummated mergers:

> During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged. In these ways, the acquiring and acquired firms are, in effect, irreversibly "scrambled" together. The independent identity of the acquired firm disappears. "Unscrambling" the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.[177]

In fact, there have been few modern antitrust cases that have dealt with post-consummation mergers, due to the pre-merger review set up by the Hart-Scott-Rodino Act.[178] This oversight of the mootness issue emphasizes the erroneous rationale of the court of appeals; the practicalities of the lawsuit seemed to have been overlooked. This failure to take into consideration merger consummation, some scholars warn, "may simply encourage either side to always appeal to judicial author-

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175. *Id.* (quoting FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1077 (D.C. Cir. 1981).

176. *See id.* "As to the distribution facilities, neither party has described what they are, suggested Wild Oats would not be a viable competitor without them, or explained why the district court could not order some provisional substitute. Moreover, the FTC is concerned about eighteen different local markets. If, as appears to be the situation, it remains possible to reopen or preserve a Wild Oats store in just one of those markets, such a result would at least give the FTC a chance to prevent a § 7 violation in that market." *Id.*

177. Complaint Counsel's Opposition to Respondents' Motion to Stay Discovery and All Other Aspects of This Proceeding at 4, *In re* Inova Health Sys. Found. & Prince William Health Sys., Inc., No. 9326 (FTC May 27, 2008), *available at* http://www.ftc.gov/os/adjpro/d9326/080527 ccoppespmostaydiscov.pdf (citing William J. Baer, Remarks Before the Conference Board (Oct. 29, 1996), *available at* http://ftc.gov/speeches/other/hsrspeec.shtm).

178. "The federal enforcement agencies occasionally undertake post-consummation challenges, either with respect to transactions that were not reportable under the pre-merger notification regime (perhaps because they were too small), or to mergers and acquisitions that my not have appeared to present competitive problems at the time they were reported, but raise concerns later." ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 433 (Thompson West) (2nd Ed. 2008).

ities because, after all, it appears almost any bell can now be unrung."[179]

Although the fate of Whole Foods is unknown, the fruits of this two-year battle ended with a consent decree between Whole Foods and the FTC.[180] Commentators, even before the settlement, had suggested that the FTC's claim had been meritless. The New York Times, a year and a half after the FTC filed its claim, wittily emphasized that the answer to the FTC's suit could be found in the marketplace; proof of the competitive behavior between Wild Oats and Whole Foods could be shown in the depressed prices of Whole Foods products post-merger consummation.[181] More recently, as of March 2009, it was reported in the Wall Street Journal that "Whole Foods [had] seen its profits battered by the economic recession and stiffer competition from traditional food retailers like Safeway Inc. and Supervalu Inc."[182] These negative ramifications only support the argument that the appellate court should have at least devoted more rationale to its holding regarding the consummation of the merger.

VI. CONCLUSION

The relaxed standard for FTC preliminary injunctions may be detrimental to the antitrust enforcement system as a whole. *Whole Foods* is illustrative of the effect preliminary injunctions have on the adjudication of FTC claims; the ultimate settlement was deemed a victory for the government. Also, the *Whole Foods* case is demonstrative of the flaws of our dual enforcement system and the erroneous determination that consummated mergers may be remedied.

Although the split decision of *Whole Foods* leaves no citable opinion of the court, as Judge Kavanaugh warned, the day a solid majority may lower the bar for the FTC to obtain preliminary injunction to block mergers does not seem too far off.[183] Indeed, there appears to be an indication by judges in both the D.C. Circuit and the Eastern

179. Assaf, *supra* note 132, at 63.

180. FTC Consent Order, *supra* note 52.

181. *See Wait. Why Is the F.T.C. After Whole Foods?*, N.Y. TIMES, December 13, 2008, at 1, *available at* http://dealbook.blogs.nytimes.com/2008/12/15/wait-why-is-the-ftc-after-whole-foods/. "Since the F.T.C. first challenged the merger in June 2007, Whole Foods has increasingly lost its hold on the organic and natural foods marketplace. Larger competitors like Safeway and Kroger have vastly expanded their store-brand offerings of natural and organic products, and they are often cheaper than those at Whole Foods." *Id.*

182. Timothy W. Martin, *Whole Foods to Sell 31 Stores in FTC Deal*, WALL ST. J., March 7, 2009, at 1, *available at* http://online.wsj.com/article_email/SB123634938198152983-lMyQjAxMDI5MzA2NjMwNDY5Wj.html.

183. *See* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1061, n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

District of Virginia that they view this lax standard to be the correct interpretation.[184]

184. *See* Jones, *supra* note 3, at 7.